

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MALHEUR

STATE OF OREGON,) Case No.: 17CR02240
)
Plaintiff,) ANTHONY MONTWHEELER'S MOTION
) FOR CHANGE OF VENUE BASED ON
) PREJUDICE
)
)
vs.)
)
ANTHONY WAYNE MONTWHEELER,)
)
) *Evidentiary Hearing and Oral Argument*
Defendant.) *Requested; Estimated 3 hours*

Defendant requests evidentiary hearing, oral argument and official court reporting services. A hearing on this matter is expected to take 3 hours.

MOTION

COMES NOW Defendant, ANTHONY WAYNE MONTWHEELER, by and through his attorneys Wm. David Falls, Nicolas Ortiz and Bryan Boender, and respectfully moves this Court pursuant to ORS 131.355, Article I, sections 11, 16 and 20 of the Oregon Constitution, and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution to enter an order changing the place of trial to another county on the grounds that so great a prejudice exists against the defendant where the action is now pending that the defendant cannot obtain a fair and impartial trial of this case.

RELEVANT BACKGROUND

Anthony Wayne Montwheeler is pending trial in Malheur County for aggravated murder and other crimes. The State has alleged that on or about January 9, 2017 Anthony Wayne Montwheeler kidnapped his ex-wife Annita Harmon, cut her throat, embarked on a high-speed police chase, and then intentionally crashed his vehicle into oncoming traffic causing the death of David Bates and seriously injuring Jessica Bates. Malheur County has a population of just 22,690 people over the age of 18 years. The County ranks as the 20th largest out of 36 Oregon counties. The nature and gravity of the charged crimes led the Malheur County District Attorney to seek the death penalty.

1 The Malheur County Grand Jury charged Mr. Montwheeler with aggravated murder based on
2 intentionally killing two persons in the same criminal episode (Counts 1 & 2) and aggravated felony
3 murder related to death of defendant's ex-wife in the course and in furtherance of kidnapping her (Count
4 3), and personally and intentionally causing the death of David Bates in the course of and in furtherance of
or in immediate flight from the crime of Kidnapping in the First Degree of an unnamed individual (Count
5 4), and further charges intentional murder of Annita Harmon (Count 5), intentional murder of David
6 Joseph Bates (Count 6), felony murder of David Joseph Bates (Count 7), kidnapping of Annita Harmon
7 (Count 8), and assault in the first degree of Jessica Sara Bates (Count 9). Mr. Montwheeler faces the death
penalty if convicted of any of the four counts of aggravated murder.

8 Just a few weeks prior to the alleged offense conduct, Mr. Montwheeler was released from the
9 jurisdiction of the Psychiatric Security Review Board (PSRB). He had been under PSRB jurisdiction for
10 nearly 20 years, after being adjudicated guilty except for insanity in 1996 following a kidnapping of a
11 former ex-wife. According to PSRB records, Mr. Montwheeler feigned insanity over the course of many
12 years in order to avoid prison. In December 2016, the PSRB held a review hearing, determined it no longer
13 had jurisdiction, and released Mr. Montwheeler into the community. The PSRB has come under intense
14 public scrutiny, being blamed for releasing Mr. Montwheeler into the community. Governor Kate Brown
15 intervened in Mr. Montwheeler's case, ordering the PSRB records to be released to the media. Similarly,
the District Attorney has released information from police reports to the named victims, which also made
its way into the media.

16 At all times since the allegations, the local press coverage of Mr. Montwheeler has been persistent,
17 prosecutorial biased, extremely inflammatory, and characterized by deep and bitter prejudice. In addition
18 to the formal press coverage, the social media commentary on the local newspaper's Facebook page has
been brutal, violent and inflammatory. The *Malheur Enterprise* (Vale, OR) has published at least 73 articles
about Mr. Montwheeler's case. The *Argus Observer* (Ontario, OR) has published 27 articles. The *Idaho*
20 *Statesman* (Boise, ID) has published 21 articles. The *Idaho Press-Tribune* (Nampa, ID) has published 8 articles.
21 The *Boise Weekly* has published 5 articles. In addition to those 129 articles published as of February 6th,

1 2019, Mr. Montwheeler has received extensive television and social media coverage. Attached as Exhibit 1
2 is a copy of a media analysis conducted by Bryan Edelman, PhD. According to Dr. Edelman, the nature of
3 the pretrial publicity surrounding Mr. Montwheeler's case, "contains some of the most sensational,
4 prejudicial, and vitriolic coverage I have seen in the 40 plus, high profile cases I have worked on . . . "

5 The press coverage and editorials cast Mr. Montwheeler in an extremely negative light. In the
6 *Malheur Enterprise*, Annita Harmon's sister called Mr. Montwheeler, "a con, a liar, a thief and a violent
7 man." The news coverage has published details of Mr. Montwheeler's criminal history that "dates back 25
8 years." The local media has made numerous references to, and described in detail, Mr. Montwheeler's
9 criminal history, including the 1996 kidnapping case that led to his PSRB supervision. The pretrial
10 publicity further describes Mr. Montwheeler as a financial burden on the community, which has had to cut
11 back on services to cover Mr. Montwheeler's medical and security costs. Ultimately, the *Enterprise* seems to
12 have expanded its circulation, leveraging its coverage of Mr. Montwheeler's case and publishing editorials
13 that read like a vendetta against the PSRB for releasing Mr. Montwheeler and blocking the paper's efforts
14 to get his medical and mental health records. After Governor Brown intervened, the *Enterprise* and other
15 outlets have published very damaging information including opinions from medical professionals who
16 considered Mr. Montwheeler potentially dangerous.

17 In addition to the media content, the *Malheur Enterprise* maintains a Facebook page where readers
18 comment on local news: <https://www.facebook.com/MalheurEnterprise/>. Readers have frequently posted
19 Facebook comments calling for Mr. Montwheeler's death and complaining about the cost, including the
20 following:

- 21 • Eye for an eye...tired of paying for him and people like him to breathe!
- A very slow death would be fine! God will take care of him where the court fails
too!
- Oh please! Get him off the street and keep him off the street! He does not even
deserve a hearing! Hang him high!

22 ///

- How is this guy not guilty he killed two people? Very sickening. He should be put in the electric chair or a firing squad.
 - What a waste of time and money, not to mention what you are doing to the victim's families.
 - More waste of tax dollars.
 - Mob with pitchforks and torches, I'm thinking. Take care of business the right way.
 - Instead of wasting tax\$, we all know he did it! He killed Annita & David leaving his beautiful wife and kiddos! Let's make an example of this "joke" and give the familys [sic] Justice they deserve. Anthony knew what he was doing when he had this planned. He knows how to manipulate the system, there is proof! A life for a life... So sorry you're families have to go through all of this Jessica & Annita!!! May Justice be served accordingly.

In addition to Facebook comments condemning Mr. Montwheeler and calling for his death, the community raised \$74,890 dollars online to support the Bates family: <https://www.gofundme.com/david-and-jessica-bates-fund>. The GoFundMe page has accepted 721 donations. The Bates family is highly regarded in the community. Victim David Bates was the Radiology Department Manager at St. Alphonsus Hospital in Ontario. He left behind his wife Jessica Bates and their five children. The *Malheur Enterprise* featured Jessica Bates in a front-page feature story and interview. The comments on the GoFundMe page emphasized Mr. Bates' good character and highlighted the emotional impact of the case. A roadside memorial remains at the site of the crash in Ontario, OR. Similarly, a GoFundMe page was set up for victim Annita Harmon, raising more than \$29,000.00. She was also memorialized during a candlelight vigil honoring victims of domestic violence.

LEGAL ARGUMENT

The trial of Anthony Wayne Montwheeler must be moved to another county on the grounds that so great a prejudice exists in Malheur County that he cannot obtain a fair and impartial trial of this case in that venue. Article I, section 11 of the Oregon Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall have the *right to a public trial by an impartial jury*" (Emphasis added). The Sixth Amendment to the United States Constitution provides (emphasis added):

1 In all criminal prosecutions, the accused shall enjoy *the right to a speedy and public trial,*
2 *by an impartial jury* of the State and district wherein the crime shall have been
3 committed, which district shall have been previously ascertained by law, and to be
informed of the nature and cause of the accusation...

4 The Sixth Amendment is made applicable to the states through the Due Process Clause of the
5 Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968). The Fourteenth Amendment to
6 the United States Constitution provides, in part, that "[no state shall] deprive any person of life,
7 liberty, or property, without due process of law[.]" In a variety of contexts, the United States Supreme
8 Court has long required heightened reliability in the decisions made by the jury and judge throughout
9 the course of a capital trial. See, e.g. *Zant v. Stephenson*, 462 U.S. 862, 884 (1983) (explaining the need
10 for reliability in the determination that death is the appropriate punishment in a specific case because
11 there is a qualitative difference between death and any other permissible form of punishment); *see also*
12 *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) ("[u]nder the Eighth Amendment, the death penalty
13 has been treated differently from all other punishments"); *Gardner v. Florida*, 430 U.S. 349, 358 (1977)
14 ("["i]t is of vital importance to the defendant and to the community that any decision to impose the
15 death sentence be, and appear to be, based on reason rather than caprice or emotion."). In sum, death
16 is different.

17 In all criminal cases, not just capital cases requiring heightened scrutiny, the Oregon Legislature has
18 codified the procedure for securing the right to a fair and impartial jury where prejudice is a concern. ORS
19 131.155 provides (emphasis added):

20 Upon motion of the defendant, the court shall order the place of trial to be changed to
21 another county if the court is satisfied that there exists in the county where the action is
commenced *so great a prejudice against the defendant that the defendant cannot obtain a fair and
impartial trial.*

22 A motion for change of venue rests with the sound discretion of the trial court. *State v. Little*, 249 Or
23 297, 312 (1967). However, a trial court's discretion is not unlimited. *Id.* at 312. A defendant is entitled to a
24 change of venue when there exists a level of prejudice against the defendant that precludes a fair and
25 impartial trial. *Id.* The statutory analysis under ORS 131.355 is the same as the state or federal

1 constitutional analysis. *State v. Fanus*, 336 Or 63, 77 (2003). In *Fanus*, the Oregon Supreme Court set forth
2 the analysis trial courts must undergo in deciding a motion to change venue:

3 In exercising its discretion to determine whether prejudice against a defendant necessitates
4 a change of venue, a trial court must evaluate the likelihood of such prejudice from both
5 the character and extent of any pretrial publicity about the case; from the degree of any
6 difficulty in obtaining impartial jurors; and from any other factor that might be indicative
7 of prejudice against the defendant.

8 *Id.* at 78-9. The United States Supreme Court has addressed two types of prejudice resulting from pretrial
9 publicity: presumed prejudice and actual prejudice. See *Murphy v. Florida*, 421 U.S. 794, 798 (1975). Actual
10 prejudice occurs where voir dire is inadequate to offset extensive and biased media coverage. *Id.*
11 Presumptive prejudice exists where the community is saturated with extremely inflammatory pretrial
12 publicity indicating a pattern of deep and bitter prejudice. See *Irvin v. Dowd*, 366 U.S. 717 (1961).

13 In *Irvin*, the United States Supreme Court found presumed prejudice and concluded that the
14 defendant had been denied a fair trial when his trial took place in a community that had been saturated
15 with extremely inflammatory pretrial publicity and that had exhibited a “pattern of deep and bitter
16 prejudice” against the defendant. *Id.* at 725-28. The publicity in *Irvin* included stories that he had confessed
17 to other crimes, and stories that detailed his background and criminal history. *Id.* at 725-26. The local news
18 published stories and interviews with locals who discussed the punishment defendant should receive. *Id.* at
19 725. Two thirds of the jurors in *Irvin* had formed opinions of the defendant’s guilt before trial started. *Id.* at
20 728.

21 In *Rideau v. Louisiana*, the United States Supreme Court found presumptive prejudice where media
22 repeatedly played the defendant’s confession. 373 U.S. 723 (1963). The crimes occurred in a parish of only
23 150,000 residents. *Id.* at 724. The police filmed a 20-minute confession. *Id.* The confession was broadcast
24 over television and some 24,000 people watched. *Id.* The Court reasoned that the residents of the parish
25 were exposed repeatedly and in depth to the defendant’s confession. *Id.* at 726. In its reasoning, the Court
26 wrote, “[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could
27 be but a hollow formality.” *Id.* The Supreme Court did not find presumptive prejudice in *United States v.*

1 Skilling, 561 U.S. 358, 361 (2010). In *Skilling*, the Court distinguished *Rideau*, a parish of just 150,000
2 residents to the venue at issue, which was the nation's fourth-largest city with 4.5 million residents. *Id.* at
3 382. The *Skilling* court also reasoned, "although news stories about Skilling were not kind, they contained
4 no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably
be expected to shut from sight." *Id.*

5 In *Sheppard v. Maxwell*, the Supreme Court also found presumptive prejudice where the news
6 coverage was so prejudicial as to deprive the defendant of a fair trial. 384 U.S. 333 (1966). The press
7 coverage included inadmissible evidence. *Id.* at 356-57. The *Sheppard* court explained that the newspapers
8 emphasized incriminating evidence against the defendant. *Id.* at 340. The media referenced evidence that
9 was not presented at trial. *Id.* The newspapers reported on the defendant's personal life. *Id.* The court
10 reasoned that "the jury's verdict [must] be based on evidence received in open court, not from outside
sources." *Id.* at 351. The *Sheppard* court also noted the prejudice caused by the release of leads, information,
11 and gossip to the press by police officers, witnesses, and attorneys. *Id.* at 359.

12 In *State v. Fanus*, the defendant moved for a change of venue. 336 Or at 74. The defendant argued
that there was at least a reasonable likelihood that he could not obtain a fair and impartial jury in Douglas
13 County because of prejudicial pretrial publicity concerning the case, and in particular about the victim. *Id.*
14 at 74-75. In support of that argument, the defendant submitted copies of news reports and articles about
the case, including 41 articles from the newspaper. *Id.* at 75. He introduced additional evidence about the
15 television coverage and other reports. *Id.* The defendant also provided a survey of Douglas County voters.
16 *Id.* Additionally, he offered the testimony of an expert witness who opined that at least a reasonable
17 likelihood existed that defendant could not obtain a fair trial in Douglas County. *Id.* In its analysis, the
18 Supreme Court compared the record made by defendant in support of his argument of prejudice to the
facts of other noteworthy cases. *Id.* at 79-80. The court emphasized the "pattern of deep and bitter
19 prejudice" language from *Irvin v. Dowd*, 366 U.S. 717, 728 (1961), and ultimately chose not to disturb the
20 trial court's ruling. *Fanus*, 336 Or at 80.

21 In *State v. Sparks*, 336 Or 298, 304 (2004), the defendant argued that prejudicial pretrial publicity

1 made it impossible for him to receive a fair trial in violation of statute and his state and federal
2 constitutional rights. The *Sparks* court explained that the standard under ORS 131.355 was whether the
3 prejudice was so great that the defendant could not obtain a fair trial. *Id.* at 305. In *Little*, the defendant
4 merely averred that there had been “numerous newspaper clippings,” and defendant provided a statement
5 signed by a number of people indicating they did not believe defendant could receive a fair trial in Lane
6 County. 249 Or at 312. The *Little* court admitted the news accounts were “factual” but that the coverage by
7 the media “inevitably makes the crime an affront to the conscience of the community.” *Id.* The Supreme
8 Court held that because none of the news coverage stated or intimated that the defendant committed the
9 crime, the prejudice, if any, would have been created against whomever was tried for the crime. *Id.* In
10 denying the defendant’s motion for change of venue, the *Little* court compared the facts to *Sheppard v.
Maxwell*, 384 U.S. 333 (1966), where the United States Supreme Court found the news coverage
11 prejudiced the defendant so as to deprive him of a fair trial by, among other things, making it appear as if
12 the defendant had committed the crime. *Little*, 249 Or at 312. The *Little* court did not find that the
13 evidence of prejudice provided by the defendant rose to the level of *Sheppard* and his motion was denied.
14

15 In *State v. Herrera*, 32 Or App 397 (1978), *reversed on other grounds*, 286 Or 349 (1978), the defendant
16 introduced newspaper articles which discussed the case. *Id.* at 401. The articles also indicated the district
17 attorney announced that one of the defendants had signed a confession. *Id.* The district attorney was able
18 to secure the attendance of eight witnesses who were questioned in court regarding the crime, and most
19 testified they were aware of the killings but not the details of the defendant’s involvement. *Id.* at 401-02.
20 The *Herrera* court held that the newspaper articles and press coverage were not so pervasive that the trial
21 court erred in denying the motion to change venue. *Id.* at 402.

22 The nature and extent of the media coverage in Mr. Montwheeler’s case far exceeds those in any of
23 the Oregon venue cases cited above. As of February 6, 2019, at least 129 articles have been published in
24 local media. The size of the Malheur County is significantly smaller than the venue in *Rideau*. Malheur
25 County has just 22,690 people who may be eligible to serve as jurors. According to Dr. Edelman, the
26 degree of coverage necessary to lead to widespread bias and misinformation is less in smaller communities.
27

1 The pretrial publicity casts Mr. Montwheeler as a con man who has manipulated the system at taxpayer
2 expense. The news coverage suggests also that the county has been forced to cut back on services in order to
3 cover Mr. Montwheeler's medical and security bills, quoting the Malheur County sheriff. Like the prior
4 criminal and personal history of the defendant in *Irvin*, the pretrial publicity in Mr. Montwheeler's case
goes into great detail as demonstrated by Dr. Edelman.

5 This case also involves extensive social media coverage and commentary that was not available at the
time in *Irvin*, *Sheppard*, or *Rideau*. Countless social media comments have been made calling for Mr.
Montwheeler's death, the following posts are among the social media commentary:

- 6 • Eye for an eye...tired of paying for him and people like him to breathe!
- 7 • A very slow death would be fine! God will take care of him where the court fails too!
- 8 • Oh please! Get him off the street and keep him off the street! He does not even deserve
9 a hearing! Hang him high!
- 10 • How is this guy not guilty he killed two people? Very sickening. He should be put in
the electric chair or a firing squad.
- 11 • What a waste of time and money, not to mention what you are doing to the victim's
families.
- 12 • More waste of tax dollars.
- 13 • Mob with pitchforks and torches, I'm thinking. Take care of business the right way.

14 In addition to the news reports and social media, the publisher of the *Malheur Enterprise* has written
15 a number of prejudicial editorials calling for justice and accountability. The *Enterprise* has a pattern of
16 requesting court documents and reporting on just about every motion filed by the defense in this case. We
17 can expect that the paper will continue to publish and comment on defense motions, including continued
18 coverage of inadmissible evidence. Also similar to the confession in *Rideau*, the news published Mr.
19 Montwheeler's confessing to malingering a mental illness in order to be released from the PSRB. The
20 media has published content from Mr. Montwheeler's medical records and played portions of the PSRB
21

1 admissions on television news. The media has saturated the small Malheur County jury pool with
2 sensational content that comments on and directly undermines Mr. Montwheeler's defense in this capital
3 case. This Court should find that the pretrial publicity in Mr. Montwheeler's case rises to the level of
4 presumptive prejudice because the community has been saturated with extremely inflammatory pretrial
publicity demonstrating a pattern of deep and bitter prejudice.

5 **CONCLUSION**

6 For the reasons stated above, Mr. Montwheeler respectfully request the court to order a change of
7 venue in this case on the grounds that so great a prejudice exists against the defendant where the action is
now pending that the defendant cannot obtain a fair and impartial trial of this case.

8 DATED this 8th day of April, 2019.

9

10 By: /s/ Bryan Boender
Wm. David Falls, OSB #841315
wmdavidfalls@gmail.com
Nicolas Ortiz, OSB #983141
nico@jinnopc.com
Bryan Boender, OSB #122823
bryan@oregonattys.com
Attorneys for Defendant Anthony Montwheeler

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CERTIFICATE OF SERVICE

I certify than I served the within ANTHONY MONTWHEELER'S MOTION FOR CHANGE
OF VENUE BASED ON PREJUDICE on:

Dave Goldthorpe
Malheur County District Attorney's Office
251 "B" St. West, #6
Vale, OR 97918
E-mail: dave.goldthorpe@malheurco.org

Attorney for State of Oregon

X by e-mailing a true copy to the above counsel.

DATED this 8th day of April, 2019.

By: /s/ Bryan Boender
Bryan Boender, OSB #122823



To: Bryan Boender, Esq.

From: Bryan Edelman, Ph.D.

Date: March 9, 2019

Re: Phase I: Preliminary Analysis of Media Coverage: *State of Oregon v. Anthony Montwheeler, Malheur County*

This memo summarizes **Phase I** results from the Change of Venue Study conducted in *State of Oregon v. Anthony Montwheeler*. The conclusions drawn in this memo are based on a preliminary analysis of the available media coverage in Malheur County and reactions on social media following the 2017 allegations of kidnapping and murder of Annita Harmon, and the death of David Bates in a head-on collision.

Experience and Qualifications

I am the co-founder of Trial Innovations, Inc., a national full-service jury research firm. Over the past 20 years, I have worked on hundreds of criminal and civil cases across the country. As a trial consultant, I have conducted mock trials, focus groups, surveys, post-trial interviews and other research exercises. I have consulted in the courtroom and assisted with jury selection in more than 100 cases. I have also served as a presenter on jury decision-making at state and county bar associations, law firms, national conferences, and webinars through Lorman Education Services and Clear Law. I have been invited by Public Defender and District Attorney Offices in multiple states to present CLE courses relating to jury selection and juror decision-making. I have also served as a guest lecturer at the University of Santa Cruz and Stanford Law School. In addition, I have published articles on jury decision-making and a book on the impact of illegitimate factors on sentencing outcomes in capital cases.

I have conducted content analyses of media coverage on a host of topics and have designed more than 50 community attitude surveys over the years. I have been retained as an expert to conduct and evaluate change of venue studies and to recommend remedial measures for addressing exposure to pretrial publicity outside of a change of venue.

I have been retained as an expert witness on change of venue in over 40 cases for the prosecution, defense and as a court expert, and have testified in state and federal courts across the country. In most of these cases, I have recommended *against* a change of venue.

Legal Standard

According to ORS 131.355, "The court, upon motion of the defendant, shall order the place of trial to be changed to another county if the court is satisfied that there exists in the county where the action is commenced so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial."

As part of my analysis I considered the following six criteria when evaluating potential prejudice in the Malheur County jury pool:

1. Nature and gravity of the crime;
2. Size and nature of the community;
3. Status of the victim in the community;
4. Status of the defendant in the community;
5. Extent and Nature of the publicity, extent being quantitative and nature being qualitative; and
6. Political controversies.

Nature and Gravity of the Crime

Anthony Montwheeler is charged with a capital crime involving four counts of aggravated murder, three counts of murder, kidnapping in the first degree, and assault in the first degree. If convicted, he potentially faces the ultimate penalty, death. It is important to note, that it has become exceedingly rare for the District Attorney in Oregon to pursue the death penalty. There are only 30 people on death row in the entire state and the last execution was in 1997.

District Attorney Dave Goldthorpe said he would seek the death penalty if Montwheeler were convicted. That decision is an indicator of how shocked the community was by this particular crime, which generated extraordinary public scrutiny of the Oregon Psychiatric Security Review Board as well as intervention from the highest levels of State government. Given these facts, it is my opinion that the nature and gravity of the crime weighs in favor of a change of venue.

County Size

The size of Malheur County is another important factor that must be considered when addressing the potential impact of the pretrial publicity on the jury pool. Sensational crimes are more likely to have a longer lasting impact on the public's consciousness in smaller counties than in larger ones, where violent crimes are more common. In addition, informal communication channels—including social media—can have a greater effect in spreading rumors and misinformation about a sensational crime such as this. Given these factors, the degree of coverage necessary to lead to widespread bias and misinformation is less in smaller communities. Malheur County ranks as the 20th largest out of 36 counties in Oregon with a population of just 22,690 people over the age of 18. That is 73% smaller than the average county population size in the state.

Status of the Victim(s)

The status of the victim is another important factor to consider when weighing the need for a change of venue. David Bates was a father of five and Radiology Department manager at St. Alphonsus Hospital in Ontario where he met his wife who was also in the car at the time of the accident. By all accounts, the Bates family had a very positive impact on the community. According to the media coverage, “the whole family was full of love and compassion in everything they did. You could never find a closer family and a better father than David.” Comments about David—some posted on a GoFundMe page for the family—from those who knew and worked with him were particularly emotional:

- “Dave had a heart of gold and was an amazing selfless man,” wrote Courtney Fulgenzi.

- David was generous, other-centered, and always gave people the benefit of the doubt.
- David was a wonderful guy and will be missed by everyone who knew him,” wrote Heather Morgan, who identified herself as a former classmate of Bates.
- David Bates was one of those managers, Hart said, who put everyone else before himself.
- “There is a lot people already know about David, but the one thing that needs to be known is he never met a stranger,” said sister-in-law Chelsea Bates. “He always made the time to meet someone whether they were walking on the street or he just saw you in the grocery store. He was always there to pick you up.”
- “It’s a huge loss to this community, and to this hospital,” Harnden said.
- Those who knew him best want the community to know the man, the father, the real David. From attending his children’s sporting events, helping out friends in need and introducing himself to strangers when they looked like they needed a friend, Bates is remembered by many after a horrific crash took his life last Monday.

A memorial was setup for David after his death at the hospital with notes from patients, coworkers, and others. A candle and flowers from various organizations were left outside his office along with a note posted to his door, “Assume Good Intentions.”

The community also galvanized to support Annita Harmon’s family. She was memorialized during a candlelight vigil to honor victims of domestic violence. In addition, GoFundMe pages were setup to raise money for both families. In just a few days more than \$29,000 had been donated.

Status of the Defendant

In contrast, the defendant has been cast in an extremely negative light. Annita Harmon’s sister described Montwheeler in the *Enterprise* as “a con, a liar, a thief and a violent man.” The coverage also details his criminal history, which “dates back 25 years.” The publicity makes multiple references to the 1996

kidnapping of his former wife and three-year-old son, which led to his supervision under the Oregon Psychiatric Security Review Board following a stipulated insanity defense. The coverage goes on to detail a number of transgressions and criminal acts by the defendant during his time under the Board's supervision:

- In 2003, Montwheeler was arrested by the Ontario Police Department for Union County charges of unauthorized use of a motor vehicle, first-degree theft and second-degree theft.
- In 2005, Montwheeler was convicted in Malheur County of reckless burning and sentenced to 18 months' probation, according to court records.
- That same year, he was convicted in Payette, Idaho for grand theft. He originally was sentenced to 18 to 30 months in prison.
- Court records show that in 2014, a warrant was issued for Montwheeler for failing to pay fines and restitution in that case.
- In 2012, he was charged with theft for failing to pay for all the scrap metal taken from a Grant County farm through his recycling business. Montwheeler was sentenced to 24 months in prison.
- While at the state hospital, he was caught "loan sharking," lending money to other patients.
- "He ran a store out of his room charging 100 percent interest for items," the report said. "He also ran a business and charged for computer parts with significant markups."
- He also was "defiant towards a particular nurse."

The pretrial publicity paints Montwheeler as a con man who has been able to manipulate the system at taxpayers' expense. He is described as a financial burden on Malheur County, which has been forced to cutback on services to the community to cover his medical and security bills:

- He's been masterful at pitching himself as a victim, all the while leaving the true victims without justice or resolution.
- Anthony Montwheeler has put the Oregon justice system through its paces the past 20 years and he's at it again to save himself.

- The man went back to the Oregon State Hospital for yet another round of care at taxpayer expense.
- Anthony Montwheeler is costing Malheur County a lot of money. And he could end up costing taxpayers even more in the future.
- The freezing on hiring and wages was instituted in February when the county was left with no money in its contingency fund for the remainder of the fiscal year, because of unexpected expenses related to weather and medical expenses for inmate Anthony Montwheeler.
- Montewheeler's hospital visit means the sheriff's office must provide a deputy for 24-hour security. That translates into big costs, Sheriff Wolfe said.
- The price tag for Montwheeler's security will stand at about \$18,000.
- If Medicaid can't cover the costs, the tab goes to the county. And that will take a sizeable bite out of the sheriff's budget.
- "We will have to reduce spending somewhere else in our budget. We sure didn't budget for him," Wolfe said.
- Anthony Montwheeler's cost to Malheur County is more than a quarter of a million dollars and questions remain about who will ultimately be stuck with the medical and security costs.
- Malheur County Sheriff Brian Wolfe said the Oregon Department of Human Services might pay at least a portion of the \$264,502 bill.
- Montwheeler has cost taxpayers for years.
- His care over those years cost at least \$1.5 million, according to state figures.

These details are not only potentially inadmissible at trial, but also can generate anger among readers who may have been directly or indirectly affected by county cutbacks. This reporting can also exacerbate animosity toward the defendant who according to the coverage "ran a medical con for 20 years" to avoid serving time in prison and cost taxpayers more than a million dollars. Reactions toward Mr. Montwheeler on social media show that this is not mere

conjecture. According to the coverage, he drew “special venom” on social media. Some examples posted to articles on Facebook include:

- Mob with pitchforks and torches, I’m thinking. Take care of business the right way.
- “Kill him” has been the theme of other comments, though put more colorfully and graphically than that.
- Hey, all. A quick reminder. We do not allow death threats or calls for violence on our page, no matter the circumstances.
- Eye for an eye...tired of paying for him and people like him to breathe!
- He’s disgusting!! Not guilty OMG hang this f\$!#\$_@
- God, PLEASE let the other inmates get him!
- A very slow death would be fine! God will take care of him where the court fails too!
- Oh please! Get him off the street and keep him off the street! He does not even deserve a hearing! Hang him high!
- How is this guy not guilty he killed two people? Very sickening. He should be put in the electric chair or a firing squad.
- What a waste of time and money, not to mention what you are doing to the victim’s families.
- Playing the system.
- No remorse or personal accountability. Sickening!
- This man makes me ill.
- More waste of tax dollars.
- Now he is costing the taxpayers of Malheur County thousands of dollars.
- Millions.

Extent and Nature of the Publicity

A search of newspapers with circulation in Malheur County returned **131** articles from the *Argus Observer*, *Malheur Enterprise*, and several publications in Idaho, which appeared between January 11, 2017 and February 22, 2019.

There is no threshold for what constitutes excessive pretrial publicity.

However, based on my analysis of the newspaper and television coverage, it is my opinion, that the jury pool in Malheur County has been exposed to extensive prejudicial and sensational publicity surrounding this case and the ensuing political controversy it created. In addition, the number of articles is concerning given the slow pace this case has taken through the courts. Coverage has persisted despite a two-year gap between the incident and arraignment. In all likelihood, there will continue to be extensive coverage as the pace increases and the case moves closer to trial.

The nature of the coverage is also an important factor to consider when weighing the need for a change of venue. The nature of the coverage in this case is highly inflammatory and prejudicial. The pretrial publicity includes sensational details, prejudicial medical records, a confession to faking mental illness, potentially inadmissible content, negative descriptions of the defendant, and political overtones.

The *Enterprise* appeared to use this crime as an opportunity to build its reputation following its public confrontation with the Psychiatric Security Review Board that led to the Governor's intervention. The newspaper dedicated considerable time and resources to covering the case and the Board. At times, the coverage came across as a vendetta against its members for trying to block the release of the defendant's medical records:

- The Security Review Board for 20 years had the duty to protect the public from Anthony W. Montwheeler.
- The public rightly questions how this could happen. So far, the Security Review Board has kept mum.
- The agency revealed its attitude towards accountability early. Soon after Montwheeler was arrested in January, the agency's executive director, Juliet Britton, said the agency couldn't release anything about him.
- Our investigation into the dangers of the system should sink spurs deep into political hides to get them moving.

- The excuse that it's not technically responsible for tracking those it releases into society is insulting. That's like driving past a burning house and deciding not to call in the alarm because you're not a firefighter.
- The governor and legislators can't assign this mission to the Psychiatric Security Review Board. This agency has shown itself too focused on safeguarding its reputation and too little interested in the stunning recidivism of those it frees.
- You didn't hear the Security Review Board among those saying something needed to change. That's because the board spent its energy feeling sorry for itself. Through its executive director, Alison Bort, the board questioned the Enterprise-ProPublica work, ignored questions and in essence said it felt unfairly picked on by the news organizations.
- She seemed to exhibit the board's disinterest in understanding what happens in Oregon when the criminally insane are discharged from state control.

The *Enterprise* also criticized Board members for releasing a dangerous man into the community without notifying the public of the risk. Some of this coverage included excerpts from the defendant's medical records which show that several members believed he was dangerous:

- Medical professionals considered him potentially dangerous and warned he needed close supervision if released into the community.
- "The patient's most likely victims of violence would be his family or active crime victims," according to a 2014 violence risk assessment.
- "There is an increased risk of aggressive behavior towards others during times when he experiences interpersonal conflict," the care plan said.
- Montwheeler was under no supervision and "the state chose not to warn those in the path of the danger he created."

- ...would walk free from the Oregon State Hospital even though officials were told he was dangerous.
- Paul said the security review board decided to release him but “this hideous and violent act of homicide could have been prevented.” He said Montwheeler was under no supervision and “the state chose not to warn those in the path of the danger he created.”

These sustained attacks began after the Board refused to turn over Montwheeler’s medical records. This led to a lawsuit and showdown, which ended when the Governor forced the Board to release the records to the public. This generated additional highly prejudicial news stories further undermining the presumption of innocence and the defendant’s insanity defense.

The *Enterprise*’s investment in this story has been rewarded, as it has garnered national attention and won several awards. The *Enterprise* has also partnered with ProPublica to investigate the Security Review Board. In addition, Les Zaitz—the paper’s editor—has written a number of prejudicial editorials hammering officials and demanding access to Montwheeler’s latest psychiatric evaluation:

- The public ought to be trusted with the latest report as well. This crime rattled Malheur County and the state’s handling of Montwheeler’s treatment over 20 years has drawn sharp questioning and the threat of lawsuits. The state has refused repeatedly to account for its conduct, staying mum even on whether it did an internal review about what happened at the state hospital.
- The justification that this is all to preserve Montwheeler’s privacy seems thin. Instead, it seems state government is pulling the shroud of privacy around Montwheeler to cloak its own conduct. That’s the very worst reason for slapping “confidential” on government records.
- As for the state, the official defiance must end. The Harmons, Jessica Bates, and five fatherless children deserve to know the truth and to see government employees and institutions don’t get to hide possible negligence behind a uniform policy of “mum’s the word.”

- Top executives at the Oregon Health Authority and the Oregon State Hospital have revealed no concern about the state's conduct. The now-disgraced Lynne Saxton, director for a few more days of the Oregon Health Authority, personally guided a state strategy to obstruct accountability. She and her staff have been more concerned with preserving secrecy than public integrity.
- She should promise the Bates and Harmon families the justice and accountability they seek. The governor should promise our community and the public at large that she will not let silence in this case stand.
- The better course now would be for the governor to step in again. Too many questions remain about what state officials knew about Montwheeler and the steps available to protect the public from someone diagnosed repeatedly as a risk. We urge the governor to appoint an outside investigator to dig in and send the bill to the Security Review Board.
- One issue is whether a review interferes with Montwheeler's right to a fair trial on criminal charges arising out of January's tragedy. The record is building that Montwheeler likely isn't going to be tried any time soon – if ever. Once again, his mental condition is in question. Meantime, his attorneys have access to boxes of files from the Oregon State Hospital that the public doesn't get to see.
- We will not be steamrolled by a state agency. We will find a way to defend ourselves and serve that public interest."
- The Oregon Psychiatric Security Review Board sued the Malheur Enterprise last week to keep it from gaining access to public records. The records relate to the state management of Anthony W. Montwheeler, who said he feigned mental illness for 20 years to stay out of prison. A month after the Security Review Board discharged him, he was accused of kidnapping and killing his third ex-wife, and killing a Vale man and injuring his wife in a collision while fleeing police. We

want to raise \$20,000 in the next 30 days to come close to matching the state.

- This case is really not about the *Malheur Enterprise*. It's about holding accountable people who run government. This is a horrific case. Two people are dead, two families traumatized. The state is trying to keep secret public records that will document what state officials knew about Anthony Montwheeler and what they did with that knowledge. Were their decisions reasonable?
- Once again, the public is being shut out from information about Anthony Montwheeler, the man accused of two murders a year ago in Malheur County. This time, citizens are left in the dark about the latest mental evaluation of Montwheeler.
- Les Zaitz, Enterprise publisher, said the newspaper sought the report to learn how state hospital doctors concluded Montwheeler was unfit for trial when the same hospital earlier concluded he had been faking a mental illness.
- Once again, the public is being told to mind its own business when it comes to Anthony Montwheeler. First state officials and now a state judge have acted to prevent the public from learning crucial information about Montwheeler's fitness for trial. The credibility of state government is as much at stake as Montwheeler's guilt or innocence.

The most prejudicial publicity to date surrounds the defendant's highly publicized medical records and a recording of him confessing to faking mental illness during a hearing that led to his release. These records were made public after the *Enterprise*'s concerted efforts to gain access. The paper detailed its attempts to retrieve the records and the Security Review Board's efforts—allegedly to protect themselves—to keep them private.

Upon their release, the local media published prejudicial content from Montwheeler's medical records and played portions of the recording on the local television news. This coverage is particularly concerning as it saturated the jury pool with sensational content that directly undermines Montwheeler's insanity

defense. The media repeatedly reported that the defendant faked his illness for 20 years after making an insanity defense to avoid prison. The coverage detailed Montwheeler's purported successful con:

- Available records establish that Montwheeler ran a medical con for 20 years, insisting to a string of state psychiatrists and psychologists that he was mentally ill. He did so to evade state prison, where he would be sent if he was convicted of kidnapping his first wife and son in Baker City in 1996
- He later testified that his insanity gambit allowed him to live off the public. He cost taxpayers millions for hospitalization and housing expenses as he moved around rural Oregon, working odd jobs and committing one crime after another – all while under the state's supervision.
- Montwheeler told doctors that he hoped his ploy would get him in and out of the Oregon State Hospital in six months, sparing him at least seven years in prison.
- After feigning insanity for years to stay out of a prison cell, Anthony Montwheeler finally confessed his scheme.
- Released from the state mental hospital in December after telling the board he had faked mental illness for 20 years to stay out of prison following the 1996 kidnapping of his first wife and son.
- “The psychiatrist said that I wasn’t crazy, there was nothing wrong with me,” he testified. “And my attorney advised me to keep that quiet and we’ll try to get you another psychiatrist.”
- After talking to his private investigator, he said, he saw a choice: go the state hospital or the less-friendly confines of prison.
- “And all I got to do is make myself sound like I’m crazy. And that’s the route I took,” Montwheeler testified.
- Other witnesses at the hearing cited records indicating Montwheeler was “coached” on mental illness symptoms and had been provided a reference book about mental health that described symptoms.

- State hospital employees said Montwheeler told them his attorney gave him a medical reference book and “coached him well on how to act if he had a mental illness,” according to a risk review dated last Oct. 25. Montwheeler said his attorney told him he would be out of the state hospital in six months instead of facing seven years in prison.
- At the state hospital, he told the board, he put on an act for his first doctor, reporting, “that I was hearing my mother and hearing people that died when I was in the Marine Corps and stuff.” “And all of that was not true?” his attorney asked. “Exactly,” Montwheeler responded.
- Besides avoiding what was shaping up to be a seven-year prison term, Montwheeler later testified how his con had cost taxpayers. The government currently pays \$18,000 a month for a single patient to stay in a secure treatment facility.
- “I could take and go and work and I could still stay in the group home and not have to pay rent or anything like that,” he testified in December. “On the state’s dime.”
- “That’s when I had enough of it,” he said. He told the medical staff he had no mental illness, that he had been faking it – malingering – for 20 years.
- “I’ve been using the system,” Montwheeler testified. “I’m done.”

The media coverage also published excerpts from the medical records which show that health care professionals had doubts about Montwheeler’s mental illness for years:

- State doctors suspected nearly 20 years ago that Anthony Montwheeler was feigning mental illness to avoid prison.
- Professionals at the state hospital subsequently concluded that Montwheeler wasn’t ill and had been “improperly” put under the control of the Security Review Board.
- State psychiatrist Mukesh Mittal testified that his exhaustive review of Montwheeler’s medical records showed no documented symptoms of mental illness.

- It wasn't until last year that cracks began to emerge in Montwheeler's scheme. One doctor in April 2016 concluded he was mentally ill. Seven months later, the doctor concluded there was no medical evidence Montwheeler had ever been mentally ill.
- Mukesh Mittal told a panel of experts a couple of years ago that Montwheeler did not, in fact, suffer from mental illness.
- The public has a right to be suspicious of that finding. Montwheeler faked his condition once before, apparently misleading state doctors. There is good reason to wonder how a new team of evaluators guarded against being tricked while assessing Montwheeler.
- In 1997, Montwheeler successfully raised the insanity defense in the face of charges he kidnapped his second wife and their son in Baker City. He testified last December he feigned mental illness so he could be sent to the state hospital instead of prison.
- Montwheeler's return to the state hospital raises questions about how his evaluation will be done. Hospital records released to the Malheur Enterprise by the Security Review Board showed he had been treated by a string of professionals for mental illness. They repeatedly concluded Montwheeler was mentally ill. Last November, however, Dr. Mukesh Mittal, a state psychiatrist, concluded Montwheeler had never shown symptoms of mental illness and that he didn't qualify for control by the Security Review Board.

The release of these medical records has generated highly prejudicial pretrial publicity exacerbated by the fact that Montwheeler is pursuing an insanity defense. Prospective jurors exposed to this pretrial publicity are likely to conclude that he is faking mental illness once again to avoid being held accountable. As such, they will likely hold the defense to a near insurmountable burden to prove that Montwheeler is not malingering. Reactions on social media indicate that many members of the community have already been affected by the coverage and exhibit strong suspicions about the defendant's latest attempt to claim mental illness:

- He will have to return to court eventually. He can't play the crazy act forever. He needs to go to real prison
- Hell he fooled them before. How stupid are these doctors?
- Anybody can act mentally unstable to get out of something. This is such bullshit! Just delaying.
- He was already unleashed by those with credentials on an unsuspecting community. Please don't make that mistake twice.
- This idiot was in a mental facility much longer than a week. He had a similar incident with his first wife. She is still alive. It is all a big game for him.
- Who gets to decide if the state doctor is fit for his job? Montwheeler fooled bunches of Oregon's mental health workers in the past. Shouldn't there be a complete shakeup of mental health professionals in Oregon based on his case alone? Shouldn't the good people of Oregon and Idaho get to have the assurance that this murderer's mental health and fitness for trial has been checked by someone unbiased? This decision regarding his fitness to stand trial must be made by someone NOT covering their rear ends in the scandal that is the mental health system in the state of Oregon!

The media coverage also contains references to potentially inadmissible information including the defendant's criminal history and the financial burden he has created for Malheur County taxpayers. In addition, several references were made to lawsuits filed by the victims' families. It was reported that Ms. Bates filed a \$5 million lawsuit against several government entities. The media detailed the claim citing Montwheeler's criminal history, including the kidnapping of his first wife and son, which resulted in his placement under the Psychiatric Security Review Board's care.

Conclusions

The nature of the pretrial publicity to date contains some of the most sensational, prejudicial, and vitriolic coverage I have seen in the 40 plus high profile cases I have worked on including the Flint water crisis, Aurora "Batman"

shooting, and others. The *Malheur County Enterprise* appears to have used this story as an opportunity to build its reputation and prestige. Its successful efforts to force the release of highly prejudicial medical records—including a recording of Montwheeler confessing to feigning mental illness to avoid prison—and its attacks on the Psychiatric Security Review Board have the potential to greatly undermined the defendant's fair trial rights. This negative effect is accentuated by the fact that Montwheeler is planning an insanity defense. In addition, the potential impact of the prejudicial coverage is greater given the small size of the jury pool in Malheur County.

It is important to note that more than two years have passed since the incident first occurred. It is possible that the influence of the pretrial publicity on the jury pool has faded with the passage of time. The prejudicial impact of the media—particularly surrounding Mr. Montwheeler's recorded confession—on the jury pool can only be captured with a community attitude survey. Given the nature of the coverage, size of the county, vitriol found on social media, and strong opinions present in Mr. Montwheeler's venire, I would recommend moving forward with **Phase II**, a community attitude survey.

Kind regards,



Bryan Edelman, Ph.D.